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14  
15 **UNITED STATES DISTRICT COURT**  
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 SCOTT WELK, INDIVIDUALLY AND  
18 ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED,

19 Plaintiffs,

20 v.

21 BEAM SUNTORY IMPORT CO. and  
JIM BEAM BRANDS CO.,

22 Defendants.

23 **Case No. 3:15-cv-0328 LAB JMA**  
Pleading Type: Class Action

24 **DEFENDANT JIM BEAM BRANDS  
CO.'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF ITS MOTION TO DISMISS  
COMPLAINT**

25 Hearing Date: May 4, 2015  
Time: 11:15 a.m.  
Courtroom: Courtroom 14A  
(14<sup>th</sup> Floor - Annex)  
Judge: Hon. Larry A. Burns

26 Complaint Filed: February 17, 2015

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiff presents a first-of-its-kind labeling claim: that a 1/16” high, 12-letter word (“handcrafted”) on the *side* of a bourbon bottle—not even visible to consumers unless they pull the bottle off the shelf and turn it—fraudulently induced consumers to buy Jim Beam white label bourbon. Plaintiff claims that because this word induced the “thousands, if not millions” of Class purchases: (1) all purchasers should get their money back; (2) Defendant should fund a corrective advertising campaign (with “written notice to the public”); and (3) Plaintiff’s counsel should receive an award of “[r]easonable attorneys’ fees.” Compl. ¶¶ 23, 64, Prayer for Relief. As demonstrated below, Plaintiff’s theory is factually and legally untenable.

Plaintiff’s unprecedented allegations, founded solely on small print on a side label, defy common sense and stretch the bounds of California’s “reasonable consumer” test beyond recognition. Plaintiff also ignores that as an alcoholic beverage, the Jim Beam label is pre-approved by a federal agency, resulting in a “safe harbor” from consumer fraud claims under California state law. Thus, even if Plaintiff could plausibly allege deception of “reasonable consumers,” which plainly he cannot, his claims would be barred.

Respectfully, all of Plaintiff's claims should be dismissed, and without leave to amend.

## **II. STATEMENT OF ALLEGED FACTS**

Jim Beam Brands Co. (“Jim Beam”) manufactures, markets and sells bourbon whisky products. *See* Compl. ¶¶ 2, 11, 12. On February 17, 2015, Plaintiff Scott Welk filed his Complaint, purportedly on behalf of all California consumers who purchased Jim Beam white label bourbon (“Jim Beam bourbon”) from February 18, 2011, through February 17, 2015. *Id.* ¶¶ 126-27. The Complaint purports to state claims under California state law: violations of the Unfair Competition Law (“UCL”) and the False Advertising Law (“FAL”), as well as claims for intentional

misrepresentation and negligent misrepresentation. Although Plaintiff named both Jim Beam Brands Co. and “Beam Suntory Import Co.” as Defendants, the entity “Beam Suntory Import Company” does not exist and is therefore not a proper defendant in this matter.

Plaintiff alleges that he purchased a 1.75 liter bottle of Jim Beam bourbon on December 12, 2013, at an unidentified “local liquor store” in San Diego. *Id.* ¶¶ 30, 34. According to his Complaint, he purchased the bourbon because it bore the statement “handcrafted” on its label, and this allegedly led him to believe the bourbon “was of superior quality” for which he was willing to spend comparatively more than he would for a lesser quality comparative product. *Id.* ¶¶ 35, 64.

Plaintiff repeatedly alleges the “handcrafted” statement appears “prominently” and in “large font” on the label. *Id.* ¶¶ 18, 21, 33. This is so patently untrue that the Complaint resorts to enlarging and distorting the appearance of the “handcrafted” statement on the label. As compared to the actual label (*see Exhibit A to Request for Judicial Notice*<sup>1</sup>), Plaintiff apparently created a blown-up version (¶ 33) by first photographing the label (it is slanted and has a glare), then – based on the fuzzy appearance – must have zoomed in on the image and stretched it horizontally to amplify its appearance. The photo of the actual label (¶ 32 as to the front and right side panels, and in full in Exhibit A to Request for Judicial Notice) demonstrates that the word appears once, in small print (only 1/16” high on the 1.75 liter bottle and only 1 millimeter high on the 750 milliliter bottle), and only on one of the *sides* of the label. Indeed, the “handcrafted” statement appears only as part of an artistic graphic

<sup>1</sup> The label from the Jim Beam bourbon is attached as Exhibit A to Jim Beam’s Request for Judicial Notice, filed contemporaneously with this motion. Courts may consider additional documents where “the plaintiff’s claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.” *Knivele v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

design above (and in the same font as) the words “family recipe” and “since 1795,” with a whisky barrel appearing in between the words. *Id.* The label itself shows that the challenged “handcrafted” statement is not – under any definition of the word – “prominent” on the Jim Beam bourbon label.<sup>2</sup> Plaintiff does not allege, nor can he, that the challenged statement appears anywhere on the front of the label, or even on the second side label, for that matter. (*See Exhibit A to Request for Judicial Notice.*)

Plaintiff alleges he was misled because Jim Beam’s production process involves “little to no human supervision, assistance or involvement.” *Id.* ¶ 36. He further alleges that photos, diagrams and video footage “taken directly from [Jim Beam’s] website” demonstrate in detail the “mechanized and/or automated” process used to produce the bourbon. *See, e.g., id.* ¶¶ 15, 16, 38-63. Plaintiff argues it was false or misleading for Jim Beam to describe its bourbon made by this process as “handcrafted,” relying on the definition provided in the Merriam-Webster dictionary (i.e., “created by a hand process rather than by a machine”). *Id.* ¶ 70. Plaintiff does not allege that he suffered any personal injury or property damage as a result of his purchase of the Jim Beam bourbon, only that he either would not have purchased the bourbon—or would have paid less for it—had he known that it “was not ‘Handcrafted.’” *Id.* ¶ 22.

### III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure (“Rule”) 12(b)(6), a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint fails to state a claim under Rule 12(b)(6) unless it contains “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. v.*

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<sup>2</sup> The Court should ignore Plaintiff’s allegations that the challenged statement is “prominent” or written in “large font.” *See Sumner Peck Ranch v. Bureau of Reclamation*, 823 F. Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987)) (“the court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint”).

1        *Twombly*, 550 U.S. 544, 547 (2007). The court should not accept unreasonable  
2        inferences or unwarranted deductions of fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
3        (2009) (noting that “[t]hreadbare recitals of the elements of a cause of action,  
4        supported by mere conclusory statements, do not suffice”). In other words, a  
5        complaint must allege “more than labels and conclusions” or a “formulaic recitation of  
6        the elements of a cause of action.” *Twombly*, 550 U.S. at 555. Rather, the factual  
7        allegations “must be enough to raise a right to relief above the speculative level.” *Id.*  
8        Where, as here, the complaint contains unsupported factual allegations and  
9        implausible theories of relief, Rule 12(b)(6) requires that the complaint be dismissed.  
10      *Id.* at 547.

11           Although a motion to dismiss may be granted with leave to amend, leave to  
12      amend is not required where “any amendment would be futile.” *See Leadsinger, Inc.*  
13      *v. BMG Music Publ’g*, 429 F. Supp. 2d 1190, 1197 (C.D. Cal. 2005); *Miller v. Rykoff-*  
14      *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citation omitted) (futility means that  
15      “no set of facts can be proved under the amendment to the pleadings that would  
16      constitute a valid and sufficient claim or defense”).

17      **IV. ARGUMENT**

18      **A. Plaintiff’s Claims Fail Because the Challenged Label is Affirmatively  
19      Authorized Under State and Federal Law**

20           Plaintiff claims that Jim Beam’s use of the statement “handcrafted” on its  
21      bourbon label violates California state law. But it is well established that Jim Beam’s  
22      compliance with federal law and regulations insulates it from Plaintiff’s claims. *Cel-*  
23      *Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999);  
24      *see also Alvarez v. Chevron Corp.*, 656 F.3d 925, 934 (9th Cir. 2011) (applying the  
25      *Cel-Tech* safe harbor to a UCL claim and applying a similar safe harbor to the  
26      Consumers Legal Remedies Act (“CLRA”) claims). As the California Supreme Court  
27      has held, California’s safe harbor doctrine applies with extra force in the context of  
28      consumer protection laws:

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“Although the unfair competition law’s scope is sweeping, it is not unlimited. … If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a ‘safe harbor,’ plaintiffs may not use the general unfair competition law to assault that harbor.”

7       *Cel-Tech*, 20 Cal. 4th at 182. Thus, where a defendant “complie[s] with the relevant

8 [federal] regulations,” its conduct is not subject to UCL or FAL claims. *Pom*

9 *Wonderful LLC v. Coca Cola Co.*, Case No. CV 08-06237 SJO (FMOx), 2013 WL

10 543361, at \*5 (C.D. Cal. April 16, 2013) (finding that the safe harbor doctrine

11 provided a separate and independent basis for dismissing UCL and FAL claims); *see also Ebner v. Fresh Inc.*, Case No. SACV 13-00477 JVS, 2013 WL 9760035, at \*6

12 (C.D. Cal. Sept. 11, 2013) (finding that compliance with FDA labeling regulations

13 insulated cosmetic manufacturer from UCL and FAL liability under California safe

14 harbor doctrine); *Davis v. HSBC Bank Nev.*, 691 F.3d 1152, 1165–66 (9th Cir. 2012)

15 (affirming dismissal of UCL claim based on safe harbor provided by federal

16 regulations).

17

18       Plaintiff nevertheless seeks to hold Jim Beam liable under state law for doing

19 precisely what the federal government has permitted. But because Plaintiff cannot

20 “assault th[e] harbor” of federal regulations through the guise of California consumer

21 protection claims, all of his claims must fail. *Cel-Tech*, 20 Cal. 4th at 182. In

22 particular, the TTB is the federal agency charged with promulgating regulations

23 regarding the labeling of distilled spirits, wines, and malt beverages pursuant to the

24 FAAA. The TTB also enforces FAAA regulations regarding the labeling of distilled

25 spirits, including 27 U.S.C. § 205(e)’s prohibition of false and misleading statements.

26 *See* [http://www.ttb.gov/main\\_pages/memo-understanding.shtml](http://www.ttb.gov/main_pages/memo-understanding.shtml); [http://www.ttb.gov/about/stat\\_auth.shtml](http://www.ttb.gov/about/stat_auth.shtml); 27 U.S.C. § 205(e); 27 C.F.R. § 5.42(1). To ensure a distilled

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spirit label “complies with applicable laws and regulations,” the TTB reviews and approves distilled spirit labels prior to the products’ distribution or sale. *See* 27 C.F.R. § 13.1, 13.21. This review includes the mandate in Section 27 U.S.C. § 205(e) that the label not be false or misleading: “[e]xamples of advertising areas that TTB will review include … [s]tatements that are false, misleading, or deceptive....” *See* [http://www.ttb.gov/consumer/labeling\\_advertising.shtml](http://www.ttb.gov/consumer/labeling_advertising.shtml); *see also* 27 U.S.C. § 205; 27 C.F.R. § 5.65(a).

When a federal agency reviews and pre-approves labels for regulatory compliance, courts across the country have consistently applied state law safe harbor provisions. While the California Supreme Court has expressly recognized such a safe harbor for California, the California courts have not yet had occasion to apply it in this scenario. *Cel-Tech*, 20 Cal. 4th at 182-185. The repeated application in other jurisdictions, including one applying California law, however, demonstrates that application here fits squarely within the *Cel-Tech* rationale. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. 13-11343-NMG, 2014 WL 866571, at \*3 (D. Mass. Mar. 5, 2014) (applying California law) (UCL and FAL claims based on allegations that prescription drug label was “misleading and inadequate” barred as a matter of law by the California safe harbor provision where drug labels are subject to FDA’s preapproval process). For instance, in *Kuenzig v. Hormel Foods Corp.*, 505 F. App’x 937 (11th Cir. 2013) (*per curiam*), the Eleventh Circuit affirmed the district court’s dismissal of the plaintiff’s “putative class-action complaint alleging that [the defendant] misled consumers into believing its lunch meat products contained fewer fat-calories than they actually did.” *Id.* at 938-39. In affirming, the court reasoned that the “[t]he labels complied with federal regulations regarding the use of percentage fat-free claims and **were approved by [the appropriate federal agency] prior to their commercial use.**” *Id.* (emphasis added). For these reasons, the court held that the defendants “could not be liable pursuant to [Florida]’s safe harbor provision.” *Id.* Other courts have done the same. *See Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d

1 1228, 1234 (S.D. Fla. 2007) (applying safe harbor where “the FDA approved the  
2 prescription drug … to reduce the risk of heart attacks …,” the drug’s “FDA approved  
3 label specifically include[d] this indication,” and “[a]ccordingly, any advertisements  
4 that stated or implied that [the drug] reduced the risk of heart disease or heart attacks  
5 simply marketed an approved use of the drug”); *DePriest v. AstraZeneca Pharm.*,  
6 L.P., 351 S.W.3d 173-78 (Ark. 2009) (applying safe harbor where the “FDA is vested  
7 with the authority to approve labeling for any new drug,” “the FDA regulates  
8 prescription drug advertising,” the FDA specifically approved the labeling for the  
9 prescription drug at issue, thus determining “that the information is not false or  
10 misleading,” and the defendant’s “advertising for [the drug] is supported by FDA-  
11 approved labeling”).

12 As described above, the TTB’s process here includes a review to ensure labels  
13 do not contain “[a]ny statement that is false or untrue in any material particular, or  
14 that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the  
15 addition of irrelevant, scientific or technical matter tends to create a misleading  
16 impression.” 27 C.F.R. § 5.65; 27 C.F.R. § 13.1, *et seq.* It is thus nearly identical to  
17 the pre-approval processes in *Kuenzig* (where the USDA reviewed meat and poultry  
18 products for compliance with the Federal Meat Inspection Act’s similar regulations)  
19 and in cases where prescription drug labels and medical devices are also expressly  
20 pre-approved. *See, e.g., Barnes v. Campbell Soup Co.*, 2013 WL 5530017, at \*5  
21 (N.D. Cal. 2013) (precluding state law claims where the USDA and Food Safety and  
22 Inspection Service “previously approved of Defendant’s … [label], [the label] cannot  
23 be construed, as a matter of law, as false or misleading”); *Meaunrit v. ConAgra Foods*  
24 *Inc.*, 2010 WL 2867393, at \*7 (N.D. Cal. 2010) (dismissing state causes of action  
25 “[b]ecause the pre-approval process [under the FMIA] includes a determination of  
26 whether the labeling is false and misleading, and the gravamen of plaintiff’s attack on  
27 the label concerns whether those instructions are accurate”); *Trazo v. Nestle USA, Inc.*,  
28 2013 WL 4083218, at \*7 (N.D. Cal. Aug. 9, 2013) (claims against Nestle’s Lean

1 Pockets and Hot Pockets dismissed because “meat products are pre-approved by the  
2 USDA, which first reviews the labels, considers whether they are false or misleading,  
3 and approves them. The Hot Pockets and Lean Pockets in question have the USDA-  
4 approved sticker on the label, indicating that they have gone through the process”);  
5 *Reigal v. Medtronic, Inc.*, 552 U.S. 312, 321 (2008) (plaintiff’s state law claims barred  
6 because the FDA provided pre-approval of the pharmaceutical label in dispute); *In re  
7 Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1203 (8th  
8 Cir. 2010) (same); *Perez v. Nidek Co.*, 711 F.3d 1109, 1118 (9th Cir. 2013) (affirming  
9 dismissal of common-law claims challenging the safety and effectiveness of a medical  
10 device that had received premarket approval from the FDA). The same result is  
11 appropriate here, and all of Plaintiff’s claims, as they arise under state law, should  
12 therefore be dismissed under California’s safe harbor doctrine. *Cel-Tech*, 20 Cal. 4th  
13 at 182.

14           **B. Even if Plaintiff’s Claims Were Not Barred by the Safe Harbor  
15           Doctrine, They Should be Dismissed**

16           **1. Plaintiff Has Not Plausibly Alleged a Likelihood of Deception**

17 Plaintiff’s claims for false advertising under the FAL and UCL must be  
18 dismissed because he has not and cannot plead that the challenged label is likely to  
19 mislead a reasonable consumer. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir.  
20 1995); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003)  
21 (reasonable consumer standard applies to UCL false advertising claims); *Consumer  
22 Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (same  
23 with respect to FAL advertising claims). To state a claim under the FAL and UCL, a  
24 plaintiff must plausibly plead that “members of the public are likely to be deceived”  
25 by the alleged false advertising statement. *Brod v. Sioux Honey Ass’n Coop.*, 927 F.  
26 Supp. 2d 811, 828 (N.D. Cal. 2013) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289  
27 (9th Cir. 1995)). Notably, “likely to deceive’ implies more than a mere possibility  
28

1 that the advertisement might conceivably be misunderstood by some few consumers  
2 viewing it in an unreasonable manner.” *Lavie*, 105 Cal. App. 4th at 508. Instead,  
3 “likely to deceive” indicates that “it is probable that *a significant portion* of the  
4 general consuming public or of targeted consumers, acting reasonably in the  
5 circumstances, could be misled.” *Id.* (emphasis added).

6 The Court need look no further than the label at issue to determine, as a matter  
7 of law, that “a significant portion of the general consuming public or of targeted  
8 consumers, acting reasonably in the circumstances” would not be misled by the  
9 “handcrafted” statement on Jim Beam’s bourbon label. *Id.*; see *Hirston v. S. Beach*  
10 *Beverage Co. Inc.*, Case No. CV-1429-JFW DTBX, 2012 WL 1893818, at \*4 (C.D.  
11 Cal. 2012) (dismissing UCL and FAL claims after concluding as a matter of law that  
12 members of the public were not likely to be deceived by the product packaging);  
13 *Werbel ex rel. v. Pepsico, Inc.*, Case No. C 09-04456 SBA, 2010 WL 2673860, at \*4  
14 (N.D. Cal. July 2, 2010) (dismissing UCL and FAL claims with prejudice where no  
15 reasonable consumer would likely be deceived by statement on product packaging).  
16 A review of the label itself demonstrates that Plaintiff’s claim fails for at least five  
17 distinct reasons: (1) the statement at issue appears only once, in small font on the side  
18 label of the product; (2) Plaintiff’s allegations demonstrate that he read the word  
19 “handcrafted” out of context; (3) the “handcrafted” statement is not a specific and  
20 measurable claim; (4) common sense defies Plaintiff’s proffered interpretation of the  
21 statement; and (5) the “handcrafted” statement could not have misled Plaintiff in light  
22 of his own allegations that videos and photographs admittedly available on Jim  
23 Beam’s own public website demonstrate the actual production process for Jim Beam’s  
24 white label bourbon.

25 First, the inconspicuous location and relative minuscule size of the  
26 “handcrafted” statement on the challenged label renders implausible Plaintiff’s claim  
27 that he was misled by that statement—let alone his allegations that an entire class of  
28 purported California consumers were misled by such statement. Despite Plaintiff’s

desperate attempts to enlarge and distort the size of the label’s “handcrafted” statement in his Complaint (*see ¶ 33*), the truth—apparent from even a cursory review of the label in its correct proportions—is that the statement appears only once, in small font, on the side of the label, and in the context of a graphic depiction relating to the recipe. This appears to be the first case where a plaintiff has based a labeling claim on a side label, a claim that cannot be reconciled with repeated court holdings that “a reasonable consumer” cannot be expected to read small print or a side label on a product. *See Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1104 (N.D. Cal. 2012) (“[A]t the pleading stage, the Court cannot conclude that a reasonable consumer should be expected to … discover the truth in the small print”); *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) (“disagree[ing] with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box”); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) (“[A] reasonable consumer might … overlook the smaller text that discloses the fat content”). With courts having held that a reasonable consumer cannot be expected to look to the small text or side label to understand ingredients, Plaintiff here cannot plausibly contend that a reasonable consumer would be deceived by, and base his or her purchasing decision on, one word on the side of the Jim Beam bourbon bottle. Moreover, unlike food or non-alcoholic beverage manufacturers, Jim Beam is not required to list the ingredients on its label. That fact underscores further that it is unlikely a reasonable consumer would look to the side label of bourbon in deciding whether to purchase it.

Second, not only does the physical location and size of the “handcrafted” statement on the label render it unlikely to mislead a reasonable consumer, the juxtaposition of the sole “handcrafted” statement with other words on the label further indicates that it is not likely to mislead a reasonable consumer. The “handcrafted” statement does not appear in a vacuum on Jim Beam’s bourbon label; instead, it

1 appears only as part of an artistic design above the words “family recipe.” Indeed,  
2 both “handcrafted” and “family recipe” are printed in the same font and are part of a  
3 unified design, with a whisky barrel appearing in between the words. Plaintiff’s  
4 Complaint completely ignores the location of the “handcrafted” statement next to the  
5 words “family recipe” and the well-established law in California that challenged  
6 claims must be considered in context. *See, e.g., Hairston*, 2012 WL 1893818, at \*4;  
7 *Koehler v. Litehouse, Inc.*, Case No. 12-cv-4055, 2012 WL 6217635, at \*3 (N.D. Cal.  
8 Dec. 13, 2012) (“To determine whether a reasonable consumer is likely to be  
9 deceived, the statement must be read in context of the entire advertisement.”) (citing  
10 *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). In *Hairston*, a plaintiff  
11 challenged the “all natural” statement on a beverage label, but because the “claim  
12 [was] based on a single out-of-context phrase found in one component” of the label,  
13 the court concluded that “Plaintiff’s selective interpretation of individual words or  
14 phrases from a product’s labeling [could not] support a CLRA, FAL, or UCL claim”  
15 and granted the motion to dismiss. The court further stated that the company did not  
16 use the challenged “language in a vacuum” and one statement could not suffice to  
17 support the plaintiff’s claim. *Id.* Likewise, Plaintiff’s theory ignores all of the other  
18 statements on the challenged label and instead presumes that reasonable consumers  
19 would latch onto the single word “handcrafted” and interpret it to refer to the bourbon  
20 itself, rather than the “family recipe” over which it directly appears. Plaintiff’s theory  
21 is implausible and should be rejected.

22 Third, even if it is plausible that a significant portion of the consuming public  
23 would see and rely on the sole “handcrafted” word on the side of Jim Beam’s label  
24 and interpret it to refer to the bourbon rather than the recipe, Plaintiff has not and  
25 cannot allege that the statement is likely to deceive reasonable consumers because the  
26 term “handcrafted,” as used on Jim Beam’s label, is not a “specific and measurable  
27 claim.” It therefore cannot mislead a reasonable consumer as a matter of law. *See Vitt*  
28 *v. Apple Computer, Inc.*, 469 F. App’x 605, 607 (9th Cir. 2012) (explaining that an

1 actionable false advertisement requires “a ‘specific and measurable claim’ capable of  
2 being proved false or of being reasonably interpreted as a statement of objective fact”)  
3 (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731  
4 (9th Cir. 1999)). Far from being a “[a] factual representation[] that a given standard  
5 has been met” (*id.* at 607), “handcrafted,” particularly in the context of distilled  
6 spirits, is a general, subjective term that is not subject to measurement. Plaintiff all  
7 but concedes that there is no established standard for the use of the term “handcrafted”  
8 in connection with the production of distilled spirits, as evidenced by his reliance on  
9 the dictionary’s definition of “handcrafted”: “created by a hand process rather than a  
10 machine” (*see Compl. ¶ 70*). But even that definition lacks the required quantifiable  
11 specificity. For example, it fails to specify what a “hand process” is, and whether  
12 such a process may include mechanized components that are directed by hand. Not  
13 only is the term “handcrafted” generalized and vague, but the Jim Beam label does not  
14 include numerical or other quantifiers (such as “100%” or “all”), that could arguably  
15 make the representation more objective. Because the term “handcrafted” on the Jim  
16 Beam label is not a “specific and measurable claim,” it cannot reasonably be  
17 interpreted in the manner Plaintiff alleges. *See Vitt*, 469 F. App’x at 607.

18 Fourth, even if the “handcrafted” statement is specific and measurable,  
19 Plaintiff’s theory that he (and an entire purported class of California consumers)  
20 would understand from the word “handcrafted” on Jim Beam’s label that the bourbon  
21 was made entirely by hand defies the common sense standard applied by the Ninth  
22 Circuit. Specifically, the Ninth Circuit has affirmed dismissal of UCL claims at the  
23 pleading stage where the plaintiff’s theory “def[ied] common sense” and “strained  
24 credulity.” *See Stuart v. Cadbury Adams USA, LLC*, 458 F. App’x 689, 690 (9th Cir.  
25 2011) (affirming dismissal of plaintiff’s claim that Trident White gum “removes  
26 stains” was misleading); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, 475 F. App’x  
27 113, 115 (9th Cir. 2012) (affirming dismissal of UCL claim because “it strains  
28 credulity” to argue that a reasonable consumer would be misled to think that ice cream

1 with “chocolate coating topped with nuts” is healthier than competing brands); *see*  
2 also *Williamson v. Apple, Inc.*, Case No. 5:11-cv-00377 EJD, 2012 WL 3835104, at  
3 \*1, 6 (N.D. Cal. Sept. 4, 2012) (dismissing UCL claim of plaintiff with a shattered  
4 iPhone who challenged Apple’s statement that the glass it uses for the phones is  
5 “comparable in strength to sapphire crystal” because “it is a well-known fact of life  
6 that glass can break under impact” and it would require “a suspension of logic” to  
7 think otherwise); *Stearns v. Select Comfort Retail Corp.*, Case No. 08-2746 JF, 2009  
8 WL 1635931, at \*11 (N.D. Cal. June 5, 2009) (intentional misrepresentation claim  
9 dismissed based on statement that beds would be “maintenance free” and that a  
10 purchaser would receive “constant and wear free support night after night” because  
11 “no product is ever maintenance-free” and “no consumer reasonably could have that  
12 expectation.”).

13 A common-sense, reasonable interpretation of the word “handcrafted” cannot  
14 be that Jim Beam employees break up the grain with their hands, stir the mixture by  
15 hand, distill and ferment the alcohol without the use of any machinery, make the glass  
16 bottles by hand, fill each bottle by hand, and handwrite each label on each bottle. The  
17 word “handcrafted” cannot reasonably be interpreted to mean, as Plaintiff would have  
18 this Court believe, that every step of the Jim Beam bourbon production process must  
19 be accomplished solely by hand. Instead, as Plaintiff points out in his Complaint, Jim  
20 Beam’s bourbon is a distilled spirit (a *consumable* good) sold throughout the United  
21 States. Of course, Jim Beam bourbon must be prepared in compliance with health and  
22 safety regulations and in a clean and sanitary manner. Not even the least sophisticated  
23 consumer of bourbon—and certainly not a reasonable consumer—would understand  
24 that this consumed drink, made from combining various ingredients together in  
25 different ways, would be literally and entirely made with human hands. *See Lavie*,  
26 105 Cal. App. 4th at 510 (the “likely to deceive” standard is an objective one based on  
27 the reasonable consumer, not an “exceptionally acute” consumer, nor the “least  
28 sophisticated consumer”). Accordingly, because a reasonable consumer could not be

1 misled, the Court should dismiss Plaintiff's claims.

2 Finally, the "handcrafted" representation could not have misled Plaintiff  
3 because, as Plaintiff highlights in his Complaint, videos and photographs admittedly  
4 available on Jim Beam's own public website demonstrate the actual production  
5 process for Jim Beam's bourbon. *See Compl. ¶¶ 15-16, 19, 38-39.*<sup>3</sup> A statement  
6 cannot be misleading where the advertiser expressly discloses to the buying public the  
7 objective facts underlying that statement. *See, e.g., Porras v. StubHub, Inc.*, Case No.  
8 C 12-1225 MMC, 2012 WL 3835073, at \*6 (N.D. Cal. Sept. 4, 2012); *Manchouck v.*  
9 *Mondelez Int'l Inc.*, 2013 WL 5400285, at \*3 (N.D. Cal. Sept. 26, 2013) (dismissal of  
10 claim premised on statement that cookies were "made with real fruit" where "the list  
11 of ingredients on the packaging serves notice to consumers that the products contain  
12 'Raspberry Purée' and 'Strawberry Purée' respectively"); *Thomas v. Costco*  
13 *Wholesale Corp.*, Case No. 5:12-CV-02908 EJD, 2013 WL 1435292, at \*5 (N.D. Cal.  
14 Apr. 9, 2013) ("no trans fat" claim on label was non-actionable where it was "clearly  
15 stated on the labeling of the product [plaintiff] purchased"). Plaintiff cannot plausibly  
16 contend Jim Beam misleads anyone about the nature of the process for producing its  
17 bourbon when Plaintiff also alleges that Jim Beam's own public materials contain the  
18 various videos and photos showing the "true" process for making the bourbon.  
19 Accordingly, Plaintiff fails to state a claim and his Complaint must be dismissed.

20 **2. Plaintiff Cannot State a Claim For Intentional  
21 Misrepresentation**

22 To state a claim for intentional misrepresentation under California law, a

23 \_\_\_\_\_  
24 <sup>3</sup> This Court may consider Jim Beam's website in ruling on a Rule 12(b)(6) motion to  
25 dismiss, given Plaintiff's extensive reliance on the website in their Complaint. *See*  
26 *Daniels-Hack v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that  
27 courts may consider documents incorporated into a complaint by reference on a Rule  
plaintiff's complaint necessarily relies upon it and no party disputes its authenticity).  
Plaintiff does not dispute the website's authenticity, and indeed he relies on the  
website extensively throughout his Complaint. (*See Compl. ¶¶ 15-16, 19, 37-63.*)

1 plaintiff must plead seven elements with particularity: (1) the defendant represented to  
2 the plaintiff that an important fact was true; (2) that representation was false; (3) the  
3 defendant knew that the representation was false when the defendant made it, or the  
4 defendant made the representation recklessly and without regard for the truth; (4) the  
5 defendant intended that the plaintiff rely on the representation; (5) the plaintiff  
6 reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the  
7 plaintiff's reliance on the representation was a substantial factor in causing that harm  
8 to the plaintiff. *Manderville v. PCG & S Group, Inc.*, 146 Cal. App. 4th 1486, 1498  
9 (2007). Here, Plaintiff's intentional misrepresentation claim fails for two reasons.  
10 First, as set forth above, Plaintiff has not and cannot plead that the challenged  
11 statement would mislead a reasonable consumer such that the consumer could have  
12 reasonably relied on it. Thus, that statement cannot form the basis of an intentional  
13 misrepresentation (i.e., fraud) claim. *See Stuart*, 458 F. App'x at 691-92 (fraud claim  
14 dismissed because challenged statement could not, as a matter of law, have misled a  
15 reasonable person).

16 Second, Plaintiff has not—and cannot—allege that Jim Beam acted with the  
17 requisite fraudulent intent to deceive in light of Plaintiff's own allegations concerning  
18 Jim Beam's production process, which it fully disclosed on its own website. In other  
19 words, Plaintiff alleges that Jim Beam itself publicly disclosed the “truth” about its  
20 distilling and bottling process on its website—which is completely inconsistent with  
21 the conclusory allegations that Jim Beam intended to defraud. *Compare, e.g.*, Compl.  
22 ¶¶ 15-16, 19 (allegations describing Jim Beam's website, photos, and video footage)  
23 with Compl. ¶ 120 (alleging Jim Beam “knew that their bourbon was not  
24 ‘handcrafted,’ but nevertheless made representations that it was, with the intention  
25 that consumer rely on their representations”). If Jim Beam intended to defraud  
26 consumers by use of the “handcrafted” statement on its white label bourbon bottle, it  
27 certainly would not publicly post what Plaintiff describes as accurate depictions of the  
28 Jim Beam production process. Jim Beam's public disclosure of its production process

is entirely inconsistent with any fraudulent intent, and Plaintiff's specific allegations on that score trump his conclusory allegations of intent. *See Chem. Device Corp. v. Am. Cyanamid Co.*, Case No. C-89-1739 WHO, 1990 WL 56164, at \*3 (N.D. Cal. Jan. 11, 1990) ("the court is not bound to accept conclusory legal allegations in the complaint when more specific allegations in the pleadings are at variance with those conclusions") (citation omitted); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001) (affirming dismissal of the plaintiff's claim, explaining that a plaintiff can plead himself out of a claim by including in his complaint and exhibits thereto detail contrary to his claims); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir. 1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Plaintiff's intentional misrepresentation claim should be dismissed accordingly.

**3. The Economic Loss Doctrine Bars Plaintiff's Negligent Misrepresentation Claims**

As Plaintiff's counsel recently conceded in a false advertising case their clients brought against another bourbon producer in this District,<sup>4</sup> negligent misrepresentation claims based solely on economic injury – like that asserted here – fail under California's well-established economic loss doctrine. Under California law, "[i]n the absence of (1) personal injury, (2) physical damage to property, (3) a 'special relationship' existing between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed." *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, 315 F. App'x 603, 605 (9th Cir. 2008) (quoting *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (Cal. 1979)). Plaintiff does not allege personal injury or property damage, only that he would not have purchased the product or would have paid less for the product absent the "handcrafted" statement. Compl. ¶ 112. Courts

<sup>4</sup> *See Nowrouzi v. Maker's Mark Distillery Inc.*, No. 3:14-CV-02885-JAH-NLS (S.D. Cal.), Dkt. 10, Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 18.

have routinely held that the economic loss doctrine bars negligent misrepresentation claims based on economic injury in consumer class actions. *See, e.g., Minkler v. Apple, Inc.*, No. 5:13-CV-05332-EJD, 2014 WL 4100613, at \*6 (N.D. Cal. Aug. 20, 2014) (negligent misrepresentation claim dismissed pursuant to the “economic loss” rule, where plaintiff alleged she would not have purchased the iPhone 5 had she known of an alleged Apple Maps defect); *Ladore v. Sony Computer Entm’t Am., LLC*, No. C-14-3530 EMC, 2014 WL 7187159, at \*8-9 (N.D. Cal. Dec. 16, 2014) (negligent misrepresentation claim dismissed pursuant to the “economic loss” rule where plaintiff alleged only economic damages as a result of his purchase of allegedly defective Sony product); *Vavak v. Abbott Labs., Inc.*, No. SACV 10-1995 JVS, 2011 WL 10550065, at \*4-6 (C.D. Cal. June 17, 2011) (negligent misrepresentation claims based solely on money damages incurred from the purchase price barred by the “economic loss” rule where purchaser alleged that she would not have paid for allegedly defective baby formula). As Plaintiff has not and cannot establish the required injury to avoid the economic loss doctrine, his negligent misrepresentation claim should be dismissed as a matter of law.

**V. CONCLUSION**

For the foregoing reasons, Jim Beam respectfully requests that the Court dismiss Plaintiff’s Complaint with prejudice as set forth herein.

Dated: March 18, 2015

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